Lim Sew Lan v Pembangunan Hysham Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S2-24-820 OF 1998
KAMALANATHAN RATNAM J
5 APRIL 1999

Contract *— Breach — Variation of contract — Representation in brochure induced plaintiff to enter into agreement — Whether parties intended representation to be condition or term of agreement — Whether omission to carry out terms of brochure amounted to breach of contract — Whether alteration of contract could go to substance or root of contract*

The plaintiff entered into a sale and purchase agreement with the defendants for the purchase of one unit of shop office consisting ground, first and second floors within six blocks of five to seven storey shop office and service suites. Recital C to the agreement confirmed that the defendants were developing six blocks of five to seven storey shop office and service suites. The plaintiff terminated the agreement after it was found that the defendants would only construct three-storey shop office without service suites. The plaintiff filed an action against the defendants claiming, inter alia, for a declaration that the defendants' representation that they would be developing six blocks of five to seven storey shop office and service suites to be deemed a term, condition and/or covenant of the agreement. The plaintiff contended that he was induced by the defendants' brochure which contained the representation to enter into the agreement.

Held, allowing the plaintiff's claim:

(1) A representation must be distinguished from a mere statement but where a statement is represented in such a way as to represent a fact which induces the representee to enter into a contract, then such a statement intends to have contractual force and is thus a contractual term. In the present case, the representation in the brochure did indeed induce the plaintiff to enter into the agreement. In any event, the representation as contained in the brochure had in fact been incorporated as Recital C to the agreement. The parties had clearly intended the said representation to be a condition or term of the agreement whereby a breach thereof would entitle the plaintiff to terminate the agreement (see p 674C–F).

(2) By refusing to stand by the brochure, recital and terms of the agreement which clearly stated that the defendants intended to build six blocks of five to seven storey shop office and service suites and substituting the same with three storey shop office with no service suites, the defendants had been in breach of s 40 of the Contracts Act 1950 (see p 675C–D).

(3) The defendants could apply for alteration but such alterations sought ought to be reasonable and ought not in any case go to the very substance or root of the contract, by being construed as a breach of a fundamental term by altering the concept, ambit and scope of the development (see p 676 G–H).

[Bahasa Malaysia summary

Plaintif telah memasuki suatu kontrak jual beli dengan defendan-defendan untuk pembelian satu unit kedai pejabat yang merangkumi tingkat bawah, tingkat satu dan tingkat dua di dalam enam blok kedai pejabat dan juga bahagian servis lima hingga tujuh tingkat. Bahagian C kepada perjanjian tersebut mengesahkan bahawa defendan-defendan sedang memajukan enam blok kedai pejabat dan bahagian servis yang mempunyai lima hingga tujuh tingkat. Plaintif telah menamatkan perjanjian tersebut selepas mendapat tahu bahawa defendan-defendan hanya akan membina kedai pejabat tiga tingkat tanpa bahagian servis. Plaintif telah memfailkan tindakan terhadap defendan dan mendakwa, antara lain, untuk suatu deklarasi bahawa representasi defendan-defendan bahawa mereka akan memajukan enam blok kedai pejabat lima hinggga tujuh tingkat dan juga bahagian servis akan dianggap sebagai suatu terma, syarat dan/atau persetujuan perjanjian tersebut. Plaintif menegaskan bahawa beliau telah didorong oleh risalah yang mengandungi representasi tersebut untuk memasuki perjanjian tersebut.

Diputuskan, membenarkan tuntutan plaintif:

(1) Suatu representasi mestilah dibezakan dengan hanya suatu kenyataan tetapi jika kenyataan tersebut direpresentasikan dalam cara di mana suatu fakta yang direpresentasikan telah mendorong penerima untuk memasuki suatu kontrak, kenyataan tersebut diniatkan untuk mempunyai kesan kontrak dan oleh itu adalah suatu terma kontrak. Di dalam kes ini, representasi di dalam risalah tersebut telah mendorong plaintif untuk memasuki perjanjian tersebut. Walau sekalipun, representasi tersebut seperti yang terdapat di dalam risalah telah dimasukkan sebagai Bahagian C kepada perjanjian tersebut. Pihak-pihak dengan jelas berniat untuk menjadikan representasi tersebut sebagai suatu syarat atau terma perjanjian tersebut di mana pemecahannya akan menjadikan plaintif berhak untuk menamatkan perjanjian tersebut (lihat ms 674 C–F).

(2) Dengan enggan menepati kenyataan di dalam risalah, bahagian dan terma-terma perjanjian tersebut yang dengan jelas menyatakan bahawa defendan-defendan berniat untuk membina enam blok-blok kedai pejabat dan bahagian servis lima hingga tujuh tingkat, dan dengan menggantikan yang sama dengan pejabat kedai tiga tingkat tanpa bahagian servis,

defendan-defendan telah memecah s 40 Akta Kontrak 1950 (see ms 675 C–D). A

(3) Defendan-defendan boleh memohon untuk meminda tetapi pindaan-pindaan yang dipohon mestilah munasabah dan tidak patut di dalam sebarang kes mengganggu asas kontrak tersebut dan ditafsirkan sebagai memecah terma utama dengan mengubah konsep, lingkungan dan skop pemajuan tersebut (lihat ms 676G–H). B

Notes

For cases on breach of contract generally, see 3 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1611–1693. C

Cases referred to

Low Kon Fatt v Port Klang Golf Resort (M) Sdn Bhd [1998] 6 MLJ 448 (refd) D

National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd [1983] 2 MLJ 211 (refd)

Legislation referred to

Contracts Act 1950 s 40 E

HL Goh (*SK Yeoh & Jeganathan*) for the plaintiff.
K Kirubakaran (*Jeyasingam* with him) (*Kiru & Yong*) for the defendants.

Cur Adv Vult

Kamalanathan Ratnam J: F

Facts

The first defendant is the owner of a piece of land ('the land') and the second defendant is presently developing the said land as a mixed residential cum commercial development known as the 'Setapak Commercial Centre' ('the Centre'). The Centre consists of six blocks of five to seven storey shop office and service suites. The plaintiff entered into a sale and purchase agreement dated 15 November 1997 ('the agreement') with both the defendants for the purchase of one unit of shop office which consists of ground, first and second floors ('the 3 storey unit') within the six blocks of five to seven storey shop office and service suites. The Recital C to the agreement confirmed that 'the vendor is developing and constructing six blocks of five to seven storey shop office and service suites in accordance with approved layout plans and specifications on part of the land'. G H

Pursuant to the terms of the agreement the plaintiff paid a sum of RM114,660 as 15% deposit upon execution of the agreement. I

The plaintiff then heard news that the defendants no longer intended to construct the six blocks of five to seven storey shop office and service suites

A but only intended to construct three storey shop offices without service suites. The plaintiff then instructed his solicitors to write to the defendants if this was true. The plaintiff's solicitors' three letters dated 12 March 1998, 18 March 1998 and 26 March 1998 to this effect, elicited no response. The plaintiff or his representative then spoke to a representative of the second defendant who confirmed that the second defendant would only construct
B three storey shop offices without service suites. This was recorded in writing by the plaintiff's solicitors' letter dated 13 April 1998. The plaintiff then terminated the agreement through his solicitors' letter dated 16 April 1998 and demanded the full refund of the deposit. Upon the defendants' refusal to comply, the plaintiff commenced this action. In the meantime, the
C defendants' application to the relevant authorities to scale down the development of the Centre to three storey shop offices had been approved on 6 October 1998.

This application

D By this originating summons the plaintiff is seeking:

1 A declaration that the defendants would be 'developing and constructing six (6) blocks of five (5) to seven (7) storey shop office and service suites on part of the land' ('representation') to be deemed a term, condition and/or covenant of a sale and purchase agreement ('agreement'), dated 19 November 1997 between the plaintiff and the defendants.

E 2 Alternatively, a declaration that the representation be implied as a term, condition and/or covenant of the agreement.

3 A declaration that the defendants' failure, refusal and/or neglect to confirm the defendants' compliance with and performance of the representation be deemed an act of repudiation on the part of the defendants, whereby the agreement has been properly terminated by the
F plaintiff effective from 16 April 1998.

4 An order that the defendants jointly and severally refund to the plaintiff the sum of RM114,660-00 being the deposit ('deposit') paid by the plaintiff pursuant to the agreement.

5 An order that the defendants jointly and severally pay the plaintiff interest
G on the deposit at the rate of 8% pa calculated from 28 April 1998 until the date of full repayment.

6 Alternatively, an order for damages and interest on the damages to be awarded at the rate of 8% pa from the date of this summons until date of full repayment.

7 An order that the defendants jointly and severally pay the costs of this
H action.

8 Such further and other relief as this Honourable Court deems fit and proper.

Findings of the court

I The brochure

The plaintiff annexed a copy of the second defendant's brochure which

included the location plan of the Centre together with details of the sub-divided lots in the six blocks. The words '6 BLOCKS OF 5-7 STOREY SHOP/OFFICE' were clearly typed in bold print at the bottom of the plan. The plaintiff contends that he was induced by this brochure to enter into this agreement. In *Low Kon Fatt v Port Klang Golf Resort (M) Sdn Bhd* [1998] 6 MLJ 448 the plaintiff had paid RM32,000 and had acquired membership of a golf resort. It was the plaintiff's case that he was lured into membership with the resort by virtue of a brochure that promised proposed facilities, in particular seasports facilities, which were not fulfilled. I had, in upholding the plaintiff's claim to rescission and ordering a refund of the sum of RM32,000, found that the plaintiff was motivated by the offer of the seasports as stated in the brochure to have entered into the contract. I also held that a representation must be distinguished from a mere statement, but where a statement is represented in such a way as to represent a fact which induces the representee to enter into a contract then such a statement intends to have contractual force and is thus a contractual term. It is time that contracting parties realize that representations contained in brochures ought not to be used as a gimmick to entice innocent parties into a bargain which the contracting party has no intention of honouring. In this case the plaintiff has emphatically maintained that he was induced by this representation to purchase the said unit. I have no hesitation therefore in concluding that the representation made in the brochure did indeed induce the plaintiff to enter into the agreement.

Recital to the agreement

I am of the view that my task has been made easier by the fact that the representation as contained in the brochure has in fact been incorporated as Recital C to the said agreement. In construing the terms and conditions of an agreement, the court has to consider the object of the agreement in tandem with the manifest intention of the parties. *Chitty on Contracts* (27th Ed) Vol 1 states at para 13-018 (p 630) as follows:

> Where words of recital or reference manifest a clear intention that the parties should do certain acts, the courts will from these infer a covenant to do such acts, just as if the instrument had contained an express agreement to that effect.

If the defendants had therefore covenanted that they would build six blocks of five to seven storey shop office and service suites then it is my judgment that a breach of such a covenant by the defendants goes to the root of the contract as a clear deviation of the manifest intention and object of the contracting parties.

Terms of the agreement

The case for the plaintiff has been made even easier by the fact that what is contained in the brochure and recital has become a term in the agreement. 'Building' has been defined in the agreement as:

> the six (6) blocks of five (5) to seven (7) storey shop office and service suites

A to be constructed by the vendor on part of the land; ... .

The word 'building' is used throughout the agreement to imply what it defines. Again this term in my view goes to the root of the agreement. It is my judgment that the parties had clearly intended the said representation to be a condition or term of the agreement whereby a breach thereof, would B entitle the plaintiff to terminate the agreement. The plaintiff had obviously relied upon and was induced into executing the agreement by the said representation.

Section 40 of the Contracts Act 1950 reads as follows:

> When a party to a contract has refused to perform, or disabled himself from C performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

In this case no doubt, by refusing to stand by the brochure, recital and terms of agreement, which clearly stated that the defendants intended to build six blocks of five to seven storey shop office and service suites and D substituting the same with three storey shop office with no service suites, the defendants have been in breach of s 40 of the Contracts Act 1950 and the plaintiff is entitled to rescind the agreement since I find that the plaintiff has not either by words or conduct acquiesced in its continuance.

Whilst vehemently denying the plaintiff's contention, the defendants E rely on cll 7.2 and 9.1 of the agreement which read as follows:

> 7.2 The building plans of the project, including the property, has been approved by the appropriate authority and no alteration to the building plans shall be made or carried out except as may be required or approved by the appropriate authority. Such alteration shall not annul the agreement or be the subject of any claim for damages or compensation by F or against any party to the agreement.
>
> 9.1 The property shall be constructed in a good and workmanlike manner in accordance with the description set out in the Third Schedule hereto and in accordance with the building plans and any other plans approved by the appropriate authorities which description and plans have been accepted by the purchaser, as the purchaser hereby acknowledges. No G changes thereto or deviations therefrom shall be made except such as may be required by the appropriate authorities and such changes, variations or amendments shall not give rise to or be the basis of any claim by the purchaser against the vendor or for the avoidance of this agreement.

These are the relevant clauses with regard to the right of the defendants to H alter the building plans. It is the defendants' contention that both these clauses seek to protect and exclude the liability of the defendants in the event there are alterations to the building plans.

Clauses 7.2 and 9.1

I To my mind the submission of the defendants that they are protected by these clauses is totally unacceptable. The exemption clause to the said clauses takes effect only when the alterations or changes or deviations of the

building plans are required or approved by the appropriate authority. It is obvious that these clauses would only apply where the alterations or changes or deviations are unilaterally imposed by the appropriate authority.

However, in cl 7.2 the exemption clause also applies to alterations approved by the appropriate authority. This I see as clearly envisaging instances where the defendants themselves apply to alter the building plans. I reject the plaintiff's submission that the word 'approved' does not relate to instances when the defendants themselves seek the 'approval' of the relevant authorities in respect of alterations to the building plans. If such an interpretation as is propounded by the plaintiff is to be accepted, then it gives the defendants no room at all to apply for approval for any alterations whatsoever. Such an interpretation would lead to ridiculous situations in that any alterations whether minor or major could result in the plaintiff seeking rescission of the contract. What is just is to strike a happy medium. Whilst the law would scoff at the interpretation sought to be put by the plaintiff the law would equally reject the submission of the defendants that whatever the alteration may be, even when such alteration goes to the very root of the original contract, so long as the alteration is approved by the appropriate authority, the plaintiff has no recourse to rescind the agreement. Both views are extremes and have no place in a just law. If indeed the defendants are entitled to a blanket protection whenever they apply to alter the building plans, there is nothing to stop the defendants from applying to alter the building plans from shop offices to a shopping mall instead, and thereafter forcing the purchasers who had bought shop offices under the agreement to buy retail lots in the shopping mall. The law will not countenance such a view. The defendants themselves had applied to the relevant authority, namely the Dewan Bandaraya Kuala Lumpur ('DBKL'), to scale down to no higher than three storey shop offices. In actual fact the letter from DBKL dated 6 October 1998 which is exhibited in support of the defendants' affidavit clearly states that the total floor space has been reduced to 396,996 sq ft. The area prior to the alteration showed the total area as 806,923 square feet. This drastic reduction no doubt would have a bearing. These are shop offices intended for business. Needless to say the plaintiff's as well as each of the purchaser's business would depend upon a high population density that would be generated if the second defendant had stuck to the original plan of six blocks of five to seven storey shop office with service suites. This must no doubt have a telling effect as to why the plaintiff now seeks a rescission of the contract. The defendants no doubt can apply to the DBKL for alteration but such alterations sought ought to be reasonable and ought not in any case to go to the very substance or root of the contract by being construed as a breach of a fundamental term by altering the concept, ambit and scope of the development.

Finally the argument of the defendants that this action ought not to have proceeded by way of an originating summons but by a writ action is unacceptable. The entire case rests, as averred by the defendants themselves, on the interpretation to be put to cl 7.2 and 9. Affidavit evidence is more than sufficient. A trial by way of witnesses' evidence would have been a waste of judicial time and litigants' money. In fact in *National*

A *Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211 the Federal Court in considering the same issue held the view that, if the party seeking a writ action wanted oral testimony of witnesses, that party could have sought leave to cross-examine the deponents to the affidavits in the original summons action. Having considered all issues I find it appropriate to grant the plaintiff an order in terms of prayers (1), (3), (4),
B (5) and (7).

Order accordingly.

Reported by Jafisah Jaafar

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